Avatar, Inc., d/b/a Downtowner Motor Inn *and* Ethel Stevenson. Case 26-CA-8799

July 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On March 12, 1982, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

[1] Respondent also filed with the Board, on May 17, 1982, a document entitled "Respondent's Supplemental Brief in Support of Its Exceptions to The Decisions [sic] of the Administrative Law Judge." This document was submitted in order to call the Board's attention to a recently issued Board decision, *G.T.A. Enterprises, Inc. d/b/a "Restaurant Horikawa,"* 260 NLRB 197 (1982), which it contends is controlling of the instant case. The document does not contain any argument in support of this contention. Thereafter, the General Counsel filed with the Board a motion to strike Respondent's "supplemental brief." The General Counsel contends correctly that this document was filed subsequent to the time permitted for the filing of exceptions and briefs, pursuant to Sec. 102.46 of the National Labor Relations Board Rules and Regulations, Series 8, as amended.

Respondent did not technically comply with Sec. 102.46(a) of the Rules and Regulations. However, in this situation, since the document proffered by Respondent contains no argument, we find that it need not be excluded as a late-filed brief. We note that the Rules and Regulations, Sec. 102.121, specify that they "shall be liberally construed to effectuate the purposes and provisions of the Act." Furthermore, the decision to allow receipt of such a document under these circumstances is a procedural step and as such is within the discretion of the Board. Additionally, the General Counsel has failed to show that it was prejudiced by our receipt of this document. We therefore conclude that the purposes of the Act are best effectuated by accepting this document, and we hereby deny the General Counsel's motion to strike. See, generally, *Otis Elevator Company, a wholly owned subsidiary of United Technologies*, 255 NLRB 235, fn. 1 (1981). We find, however, that the case cited by Respondent is clearly distinguishable from the instant case.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In his recommended Order, the Administrative Law Judge inadvertently failed to provide a narrow cease-and-desist order. We will modify his recommended Order to so provide.

Member Jenkins would compute interest on Stevenson's backpay in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Avatar, Inc., d/b/a Downtowner Motor Inn, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1 of the Administrative Law Judge's recommended Order:

"1. Cease and desist from:

"(a) Interfering with, restraining, and coercing employees by discharging, refusing to reinstate, or otherwise discriminating against them because they have engaged in activity protected by Section 7 of the Act.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT discharge, refuse to reinstate, or otherwise discriminate against our employees because they engage in a work stoppage in support of their demand for timely payment of their wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed

them by Section 7 of the National Labor Relations Act.

WE WILL reinstate Ethel Stevenson to her former job or, if that job no longer exists, to substantially equivalent employment with full backpay covering the earnings she lost because we unlawfully terminated her, with interest.

WE WILL expunge from Ethel Stevenson's personnel record all references to her unlawful discharge on October 22, 1980.

AVATAR, INC., D/B/A DOWNTOWNER MOTOR INN

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: This proceeding was heard before me at Memphis, Tennessee, on August 31, 1981, pursuant to a complaint which was issued on January 30, 1981, and amended on February 4, 1981. The underlying charge was filed by Ethel Stevenson on December 31, 1980, and amended on January 23, 1981.

The complaint, as amended, alleges that the Company, Avatar, Inc., d/b/a Downtowner Motor Inn, violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 151, *et seq.*), herein called the Act, by discharging employee Ethel Stevenson because she engaged in a concerted work stoppage protected by Section 7 of the Act. The Company, by its timely answer, denied commission of the alleged unfair labor practice.

Upon careful consideration of the entire record, from my observation of the witnesses as they testified, and upon consideration of the post-trial briefs received from the General Counsel and the Company, respectively, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE COMPANY

From the pleadings, I find that the Company, Avatar, Inc., d/b/a Downtowner Motor Inn, is a corporation with office and place of business in Memphis, Tennessee, where it operates a motor inn. During the 12 months ending January 30, 1981, the Company, in the course and conduct of its business, purchased and received at its Memphis, Tennessee, motor inn, goods and materials valued in excess of $5,000 from other enterprises located within the State of Tennessee, each of which other enterprises had received the said goods and materials directly from points outside Tennessee. During the same 12-month period, the Company derived gross revenues in excess of $500,000 from the operation of its motor inn. The Company conceded, and I find from the foregoing data, that the Company is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Facts*

The following facts are undisputed. On the morning of October 22, 1980, Ethel Stevenson, a cashier and waitress at the Company's motor inn, clocked in at aproximately 5:30 to begin work. As Stevenson clocked in, she read the following notice typed on a company letterhead and signed by John Manser III, manager of the Company's Downtowner Motor Inn:

> *ATTENTION ALL PERSONNEL:*
>
> DUE TO CIRCUMSTANCES BEYOND OUR CONTROL, WE WILL BE UNABLE TO ISSUE PAYROLL CHECKS UNTIL AFTER 2:00 PM, THURSDAY AFTERNOON.
>
> IF THIS PUTS ANY OF YOU IN AN IMMEDIATE POSITION OF JEOPARDY, PLEASE COME TO SEE ME ON AN INDIVIDUAL BASIS.
>
> WE ARE SORRY FOR THIS DELAY, AND WISH TO APOLOGIZE FOR THE INCONVENIENCE.

Waitress Roxanne Williams observed the same notice when she clocked in shortly after 5:30 a.m., as did waitress Tijouna Edwards, who reported to work at approximately 6 that same morning. Amy Jones, who was employed there as a cook, reported to the inn shortly after 6 o'clock on the morning of October 22 and learned of the notice from her daughter, Roxanne Williams.

Shortly after Stevenson and her colleagues had reported to work, a number of persons scheduled to take the Armed Forces entrance examination began arriving at the Company's restaurant seeking breakfast. The three waitresses served breakfast to the so-called AFEES until approximately 7 a.m. when the last of them departed from the restaurant. The waitresses did not remove the dirty dishes left by the AFEES on the inn's dining room tables.

Instead of cleaning up and preparing the tables for other patrons, Stevenson, Williams, Edwards, Jones, Debra Key, a cook, and Marvin Reed, a dishwasher, sat down at a table and began discussing the announced delay in the issuance of their paychecks. Stevenson, Williams, and Edwards decided that they would not clean off the dining room tables until Manager Manser had explained the 1-day delay in the issuance of their paychecks. The two cooks, Amy Jones and Debra Key, and Marvin Reed, the dishwasher, also expressed interest in receiving their paychecks on time. However, they returned to their duties in the kitchen, while the three waitresses remained at the table awaiting Manager Manser's arrival.

John Manser arrived at the dining room between 8 and 8:30 a.m. Upon his arrival, he became annoyed when he noted the three waitresses sitting at a table and saw the dirty dishes and the remains of breakfast. Manser demanded an explanation of the apparent work stoppage from the waitresses. Stevenson replied, "Johnny, we wants to know why we are not going to get paid today."

Manser did not respond. Instead, he turned away from Stevenson and retreated into the kitchen. Stevenson quickly led the other waitresses into the kitchen seeking the manager.

When Stevenson and her colleagues arrived in the kitchen, they found Manser discussing the matter with cook Amy Jones. Prior to their arrival Manser had asked Jones what the problem was. She replied, "Johnny, it seems to be a money problem." Manser replied, "No, it is no money problem." At this point, waitresses Stevenson, Edwards, and Williams arrived in the kitchen. Manser, while continuing to talk to Amy Jones, turned around, looked straight at Ethel Stevenson, and said, "I am tired of this shit." When Stevenson expressed resentment at his language, Manser apologized. Manser then asked the waitresses to return to the dining room and clean up the tables. Stevenson asked, "Well, are we going to get paid?" Manser answered, "We will talk about it." At this, Stevenson, Edwards, and Williams returned to the dining room and cleaned the dishes off the tables and reset them.

Manser went back to his office. He told his assistant manager, Debbie Capps, that the dining room employees had stopped working because their paychecks were late. Manser's first impulse was to give Ethel Stevenson her paycheck. He called the dining room and requested Stevenson to appear in his office. After she arrived, he decided to give all the waitresses and the kitchen staff their paychecks. Manser telephoned the restaurant, told the night auditor to watch the restaurant, and instructed her to tell the remainder of the kitchen and dining room staff to come to his office.

When the kitchen and dining room employees had assembled in his office, Manser asked which employees wanted their paychecks immediately. All six indicated their desire to be paid. Manser also informed the employees that their checks were late because the Company had not received payments from St. Jude's Hospital and the Armed Forces entrance examination station. These two clients provided the Company with the bulk of its revenues. After they were paid, the employees left the office and returned to their work stations.

Ethel Stevenson went back to the restaurant's cash register where she began ringing up dining room checks. At approximately 11 a.m. Manser came to her with an envelope and said, "Ethel, here is your second check." Stevenson thanked him and left the premises. Manser did not provide Stevenson with an explanation for her termination.

B. *Analysis and Conclusions*

The General Counsel contends that the Company violated Section 8(a)(1) of the Act by discharging Ethel Stevenson because she led the work stoppage on the morning of October 22, 1980. The Company argues that, although the work stoppage was concerted activity, it was unprotected, and that Stevenson's use of obscene language after Manser distributed the paychecks was misconduct serious enough to deprive her of the protection of Section 7 of the Act.[1] However, for the reasons stated below, I find that the Company discharged Ethel Stevenson in violation of Section 8(a)(1) of the Act on October 22, 1980.

The announced 1-day delay in the issuance of their paychecks was a change in a condition of employment which directly concerned employees Stevenson, Williams, and Edwards. *Interstate Transport Security/Division of PJR Enterprises, Inc.*, 240 NLRB 274, 276 (1979). Their resort to a work stoppage pending receipt of Manager John Manser's explanation of the delay constituted concerted activity protected by Section 7 of the Act notwithstanding that the stoppage may have interfered with the Company's business *American Truck Stop, Inc.*, 218 NLRB 1038, 1041 (1975); *IPC, Inc.*, 238 NLRB 1221, 1225 (1978). As the Board stated in *Plastilite Corporation*, 153 NLRB 180, 183–184 (1965):

> When a "labor dispute" exists, the Act allows employees to engage in any concerted activity which they decided is appropriate for their mutual aid and protection, including a strike, unless, unlike the situation here, that activity is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions.[11]

[11] E.g., strikes which are unprotected because they are otherwise unlawful (*Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31), violent (*N.L.R.B.* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240), or in breach of contract (*N.L.R.B.* v. *Sands Manufacturing Co.*, 306 U.S. 332), and activities which are "indefensible" because they evidence a disloyalty to the employer (*N.L.R.B.* v. *Local No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 477).

It is also well settled that an employer who discharges an employee for engaging in a work stoppage protected by Section 7 violates Section 8(a)(1) of the Act. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *American Truck Stop, Inc.*, 218 NLRB at 1041.

The Company in its brief, as did Manager Manser on October 22, 1980, recognized Ethel Stevenson as the leader and spokesperson in the work stoppage. It was Stevenson who asked Manser to explain the announced delay in the issuance of the employees' paycheck. She persisted in pressing Manser to issue the paychecks on schedule.

When Manser withdrew to the kitchen after his initial encounter with Stevenson, he began discussing the announced delay in the issuance of wage checks with kitchen employees. When Stevenson arrived on the scene, he exclaimed, "Damn it. I am tired of this shit." As he spoke, he focused his eyes on Stevenson. Undaunted by Manser's harsh remark, Stevenson asked for his assurance that the employees would be paid that day when he asked her and her associates to clean off the dining room tables. In his testimony before me, Manser ad-

[1] Sec. 7 of the Act provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

mitted that the stoppage irked him and that he considered it to be "like a mutiny."

Manser's special attention to Stevenson in the kitchen, and his initial impulse to pay her separately from her colleagues, was followed quickly, that same day, by his decision to discharge Stevenson. Thus, the train of circumstances leading up to Stevenson's discharge strongly suggests that Manser decided to get rid of her in reprisal for her role in the work stoppage.

Review of Manager Manser's statements following Stevenson's discharge, including his testimony at the instant hearing, reveals the pretextual nature of the Company's defense. Fatal to Manser's credibility was his offer of shifting and inconsistent reasons for discharging Stevenson.

Initially, however, Manser gave Stevenson no explanation for her discharge as he gave her a final paycheck. A separation notice which Assistant Manager Capps prepared on Manser's instructions on October 22 bears an "X" in a box captioned "Voluntarily Quit." However, on the same form I noticed an effort to cross out a mark in a box captioned "Discharge." Elsewhere on the separation notice in an area marked "Detailed Explanation" the Company inscribed the following: "([G]iven upon request.)"[2]

In a statement which Manser prepared for the State of Tennessee, he explained Stevenson's separation as follows:

> On Ethel Stevenson's separation notice, we indicated she quit her job.
>
> We did this because of a work stoppage the morning she was terminated, that we feel was instigated by Ethel, and due to this she was discharged. She was out of line in her actions that day, and due to this, we feel she should not receive any unemployment compensation.
>
> Detailed information about the occurrence that day were noted in the files, and are available upon request. In addition, Ethel was not discharged for expressing her opinion, which I welcome to any of the employees, but rather for her actions, and causing an inconvenience for the guests and customers in the dining room.

In a report which he prepared on October 22, after Stevenson's termination, and which he and Assistant Manager Capps signed, Manser provided a detailed account of the work stoppage and Stevenson's termination. Discussing Stevenson's termination, he reported his thoughts and recollections regarding Stevenson's termination as follows:

> After a few additional thoughts on the matter, and after all the employees had since gone back to work, I felt there was no excuse for this situation to have occurred, and since the work stoppage had occurred in the dinning room serving area, I felt some immediate action needed to be taken in this area.
>
> At that point, Debbie Capps computed Ethel Stevenson's final wages, due in addition to the check she had just received, and prepared a proper separation notice. The notice reflected the reason for her termination was due to the fact that she voluntarily quit her job, with no consultation with manager, in full at that point in time, and I felt that she was the individual person responsible for the work stoppage in the dining room serving area. Marvin Reed, the dishwasher, told me later on that he made an attempt to clean and bus the tables in the dining room, and that he was told to stop and not clean any of the tables, which he obeyed his instruction.

In a separate note reporting his exchange with Stevenson, Manser for the first time, in writing, reported that after he said "goddam it," and after she left his office with her paycheck in hand, he heard Stevenson say, "I bet the m—r f—r bounces."

In a letter to the Tennessee Department of Employment Security dated January 2, 1981, Manser, without a word about Stevenson's language after the issuance of paychecks to her and her colleagues, again explained his decision to discharge Stevenson as follows:

> Fact: This company has met payroll on time, every two weeks, in four years, on the 7th and 22nd of every month. If payroll dates fell on Saturday or Sunday, checks were often released on Friday as a courtesy to our employees. Ms. Stevenson received her check in this manner many times.
>
> Fact: Our payroll was delayed *one* during the month of October, 1980 due to a large accounts receivable being delayed. A notice was posted on the 21st of October to this effect, (please see enclosed copy of notice). I will emphasize that the notice states: "If this puts any of you in an immediate position of jeopardy, please come to see me on an individual basis". Paychecks were passed out on October 23rd, at 2:00 pm.
>
> Fact: When I entered the restaurant on the morning of October 22nd, every table (15 tables) were piled full of dirty dishes. The restaurant had been opened two hours at this time and not one table had been cleaned, for a guest to eat. Let me make sure this point is clear. We do a large amount of business between 6:00 and 8:00, am. and every meal that morning had been left on the tables. *No* consideration was given to our customers in regard to their comfort and health safety. Not only had Ms. Stevenson broken our policy but also health department laws.
>
> Fact: Ms. Stevenson instigated the action, as pointed out from attempts by the dishwasher to clean the tables, and being told by Ms. Stevenson to not touch the dirty dishes. No employee in the restaurant would have taken this uncalled action without Ms. Stevenson's direction and the situation

[2] Manager Manser admitted that he instructed Capps to make out Stevenson's separation notice to show that "she quit." In her testimony Assistant Manager Capps admitted that the separation notice contained an "X" next to the caption "Voluntarily Quit" and that a mark had been placed in a box next to the word "Discharge" and the "scratched through."

> would no [sic] have occurred, had she not stopped the dishwasher from cleaning the tables.
>
> Fact: It was Ms. Stevenson's job to see that guests were given a clean table and a proper setting to eat their meal from. She accepted this responsibility when she became an employee of this company.
>
> Fact: This is a viable corporation and claimant had no reason to suspect serious financial difficulty.
>
> Fact: Separation notices stated Ms. Stevenson had quit. It was my contention at the time she had quit work when she dropped her responsibilities and job duties.
>
> It is my opinion that Ms. Stevenson was insubordinate in her actions. . . .

However, in a precomplaint affidavit which Manser gave to a Board agent he declared:

> Approximately 10 minutes after the employees left the office was when I made the decision to terminate Stevenson for the following reasons: I felt that she instigated the work stoppage even though the notice on the timeclock indicated that I would confer with employees over any problems the late paychecks presented; the alleged work stoppage had an impact on guests in the motel (dirty dishes being left in the dining area); and, the statement she made as she left my office I described above. ["That she bet the m—r f—g check would bounce."]

In the next paragraph of his affidavit, Manser said, "As stated above, at the time I made the decision to terminate Stevenson I based it on all three factors listed in the prior paragraph."

At the hearing, when asked by counsel for the General Counsel to present reasons for his decision to discharge Stevenson, Manser testified, "I discharged Ms. Stevenson for failure to perform assigned job duties and other reasons, Manser reduced it to one reason, "[T]he statement made leaving the office after picking up her paycheck." Later in his testimony, under further pressure, Manser testified that there was one other factor which he "took into consideration" and that was that "notice had been given to Ms. Stevenson and the other employees about the problem was with the paychecks." At a further point, Manser said that the main reason for discharging Stevenson "was the comment she made out of the office." Then he added:

> I couldn't say that she would have been fired for just the dishes being left on the tables or just the comment alone, but the two of them together. If it was another employee that made the comment, possibly they would have been fired.

When asked again whether Stevenson's leading role in the work stoppage was one of the real reasons for the discharge, Manser replied, "I felt she was the instigator, that is true, but I took the comment into consideration with that." Manser's inconsistencies and his addition of reasons for Stevenson's discharge evidenced an attempt to obscure detection of an unlawful discharge.

In light of Manser's written statements to the State of Tennessee, and his written report, and the inconsistencies in his testimony before me, I have rejected the latter to the extent it was inconsistent with, or sought to explain away, those statements or the report. Nor have I credited Manser's assertions of reasons for Stevenson's discharge as set out in his affidavit. For he gave this affidavit after he was confronted by her initial unfair labor practice charge alleging that discharge to be violative of Section 8(a)(1) of the Act.

Nor do I credit Debbie Capps' testimony that Manser told her that he was discharging Stevenson "[b]ecause of the work stoppage and what they had done in the restaurant that morning affecting the business and what have you and about her comment about the check had a little bit to do with that, too." Capps' reliability was cast in doubt by her apparent hostility toward the questioning by counsel for the General Counsel, her unfounded complaint at the close of her testimony that she had been badgered, and the fact that on October 22 she had signed Manser's report which declared that Stevenson's participation in the work stoppage was the sole reason for her discharge.

In any event, the additional reasons belatedly urged do not withstand scrutiny. Thus, the harm the work stoppage may have caused the Company's restaurant operation did not remove that concerted activity from the Act's protection. The above-quoted excerpt from the Board's decision in *Plastilite Corporation*, 153 NLRB at 183–184 is instructive in this regard. For it teaches that the broad protection affored by Section 7 of the Act to primary work stoppage is not withheld where the stoppage hampers an employer's business operations, unless such a stoppage "is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions" (*id.*) not shown here.

Further, I find that Stevenson did not make the obscene remark which the Company attributed to her. The credited testimony of General Counsel's witness Tijouna Edwards shows that soon after she had received her check and as she was walking away from Manser's office, she overheard some remark that "the check would bounce." However, Edwards did not know who make the remark. Ethel Stevenson, a frank and forthright witness, flatly denied that she made the obscene remark attributed to her by Capps and Manser, whom I have found to be unreliable witnesses. Thus, although the remark was made by one of the employees, within earshot of Manser's office, Stevenson was not the one who uttered it.[3]

[3] The Company's reliance upon *Sullair P.T.O., Inc.* v. *N.L.R.B.*, 641 F.2d 500, 502–503 (7th Cir. 1981), and cases cited in that decision, is misplaced. In *Sullair* the court found, contrary to the Board, that an employer lawfully discharged an employee for insubordination because he repeatedly addressed obscene language to members of management while engaged in concerted activity protected under Sec. 7 of the Act. The court found support for its decision in, *inter alia*, *N.L.R.B.* v. *Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brother of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 630 F.2d 505 (7th Cir. 1980); *Florida Steel Corporation* v. *N.L.R.B.*, 529 F.2d 1225, 1234 (5th Cir. 1976); *Chemvet Laboratories, Inc.* v. *N.L.R.B.*, 497 F.2d 445 (8th Cir. 1974); and *Boaz Spinning Company, a* *Continued*

In sum, I find that Manser discharged Stevenson solely because she was the apparent leader among his waitresses in the work stoppage on October 22, 1980. Accordingly, I further find that, by Manser's discharge of Ethel Stevenson, the Company violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Company, Avatar, Inc., d/b/a Downtowner Motor Inn, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employee Ethel Stevenson on October 22, 1980, and thereafter failing and refusing to reinstate her, the Company has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and continues to do so, and has thereby engaged in the continues to engage in unfair labor practices violative of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in and continues to engage in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and decision therfrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Company unlawfully discharged employee Ethel Stevenson, I shall recommend that it be ordered to offer her full reinstatement to her former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed. Additionally, I shall recommend that the Company make Ethel Stevenson whole for any loss of pay, benefits, or other rights and privileges she may have suffered as a result of her unlawful discharge. Backpay thereon is to be computed in the manner set forth *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4] Finally, the Company shall be ordered to expunge from Ethel Stevenson's personnel records all references to her unlawful discharge on October 22, 1980.

subsidiary of Standard-Coosa-Thatcher Company v. *N.L.R.B.*, 395 F.2d 512 (5th Cir. 1968). In each of the cited cases, the court disagreed with the Board's assessment of employee conduct of language directed at an employer, a principal shareholder, or a manager, respectively, in the course of conduct otherwise protected by Sec. 7 of the Act. Here, however, I have found that Stevenson did not make the obscene remark attributed to her by the Company. Thus, the instant case is clearly distinguishable from the foregoing authorities.

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Avatar, Inc., d/b/a Downtowner Motor Inn, Memphis, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from interfering with, restraining, and coercing employees by discharging, refusing to reinstate, or otherwise discriminating against them because they have engaged in activity protected by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Ethel Stevenson immediate and full reinstatement to her former job or, if her job has been eliminated, to a substantially equivalent position, without loss of seniority or other rights and privileges, and make whole for any loss of earnings she may have suffered, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from Ethel Stevenson's personnel records all references to her unlawful discharge on October 22, 1980.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the backpay due under the terms of this Order.

(d) Post at its Memphis, Tennessee, motel copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."